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In The Supreme Court of the United States

ECHOSTAR COMMUNICATIONS CORPORATION, *et al.*,

Petitioners,

v.

FOX BROADCASTING COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Time and again, this Court has stated that injunctive relief provisions in federal statutes should be strictly interpreted to protect the traditional authority of district courts to exercise discretion in crafting injunctions tailored to the facts of specific cases. The Eleventh Circuit deviated from that cardinal principle here. It held that the Satellite Home Viewer Act ("SHVA") and the Satellite Home Viewer Improvement Act ("SHVIA") (collectively the "Act")[1] strips district courts of all equitable discretion and compelled the entry of a permanent nationwide injunction in this case. That holding has had profound ramifications. It has deprived hundreds of thousands of individuals across the country of access to network television programming. As EchoStar argued in its petition, the sheer national impact of the Eleventh Circuit's construction of the Act and the conflict it has created with this Court's teachings on the interpretation of statutes that purport to eliminate the discretion of district courts to fashion injunctions on a fact-specific basis together furnish substantial grounds for granting the petition. Respondents' opposition fails to dent that argument.

I. THE PETITION PROVIDES THIS COURT WITH ITS ONLY REALISTIC OPPORTUNITY TO CONSIDER AN ISSUE THAT HAS PROFOUND NATIONAL CONSEQUENCES.

Respondents do not dispute EchoStar's showing that no circuit conflict on the question presented in the petition is likely ever to arise, and that therefore this case probably

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[1] SHVA, Pub. L. No. 100-667, tit. II, 102 Stat. 3935 (1988); SHVIA, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

furnishes this Court with its only opportunity to consider that issue. Respondents' contention that the question "has no recurring legal significance," and is "of importance only to the parties," Brief in Opposition 13 [hereinafter "Opp."], is misguided. That the question will not arise in the future does not diminish its significance for hundreds of thousands of individuals across the country whose connection to network television programming has been terminated as a result of the entry of the permanent nationwide injunction mandated by the Eleventh Circuit, and who now are scrambling to find alternative connections.[2] The importance of the question to vast numbers of households, notwithstanding the absence of a circuit conflict, highlights the enormous national impact of the Act, as well as the national impact of the actions of the parties to this case, all of whom play a major role in the communication of information on which our society relies on a daily basis.[3]

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[2] As of the date the petition was filed, the district court had not yet entered the permanent injunction following the issuance of the Eleventh Circuit's mandate. Pending before the district court at that time was a joint motion of EchoStar and the Respondent Affiliates to approve a settlement agreement that they had reached, but which Respondent Fox opposed. Pet. 9 n.5. Since then, the district court (which believed that it was constrained by the Eleventh Circuit's mandate) has rejected the settlement agreement, and entered the permanent injunction, which went into effect on December 1, 2006. *See CBS Broad, Inc. v. EchoStar Communications Corp.*, No. 98-2651-CIV (S.D. Fla.), Docket Numbers 1019 and 1020.

[3] No circuit conflict ever could develop on the Patent Act question presented in *eBay, Inc. v. MercExchange, LLC*, 126 S. Ct. 1837 (2006), because of the Federal Circuit's exclusive jurisdiction over patent issues. Yet, this Court exercised its certiorari jurisdiction there to resolve a question that falls within the same general subject matter of the question presented here: the interpretation of federal statutes that are purported to eliminate the traditional discretion of district courts to fashion appropriate injunctive relief tailored to the facts of a particular case.

Respondents also are off base in asserting that EchoStar has exaggerated the importance of the question presented. Respondents first say that many households affected by the Eleventh Circuit's decision were ineligible to receive distant network signals under the Act. Opp. 12. Respondents do not contest, however, that a large portion of the affected households indisputably are eligible, and yet, the permanent injunction mandated by the Eleventh Circuit requires the termination of their distant network programming.[4]

Second, Respondents state that because EchoStar offers "local-into-local service" that is not affected by the injunction mandated by the Eleventh Circuit, "[t]he overwhelming majority of EchoStar's subscribers thus will be able to continue to receive network programming from EchoStar itself." Opp. 11-12. Respondents are comparing apples with oranges. As Respondents acknowledge (Opp. 3), "local-into-local service" is distinct from distant network service. While some of EchoStar's distant network subscribers still will be able to watch local network channels through local-into-local service, many will not – and it is those latter subscribers who were at the core of Congress' concern in adopting the Act.

Third, Respondents suggest that EchoStar customers affected by the entry of the injunction can simply change technologies and subscribe to cable. Opp. 13. This supposed solution to the disruption wrought by the termination of distant network signals to EchoStar subscribers is at odds with the Act's goal of enhancing competition in the

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[4] Still more households would have been eligible had the district court not felt constrained by the Eleventh Circuit's mandate and instead entered EchoStar's settlement agreement with the affiliates. *See supra* note 2.

telecommunications industry by placing satellite carriers on equal footing with cable companies. Pet. 12. Alternatively, Respondents suggest that affected consumers could sign up with EchoStar's satellite competitor DirecTV. Opp. 13. This suggestion too has anticompetitive effects. News Corporation, the parent company of Respondent Fox Broadcasting Company, Opp. ii, owns approximately 34% of DirecTV, and thus stands to benefit if EchoStar customers switch to DirecTV. *See* Pet. 12-13 n.8.

Fourth, Respondents chide EchoStar for citing *United States v. Donovan*, 429 U.S. 413 (1977), as an example of a case in which the national ramifications of an interpretation of a federal statute justified the exercise of this Court's certiorari jurisdiction. According to Respondents, the statute at issue in *Donovan* (the federal wiretap law) is more significant than SHVA. Opp. 12 n.11. Respondents' attack misfires. In both *Donovan* and this case, the importance of the statutory construction question stems from "the fact that many individuals are involved or affected by the decision below." Robert Stern et al., *Supreme Court Practice* 249 (8th ed. 2002) (citing *Patterson v. Lamb*, 329 U.S. 539 (1947)).

II. THE ELEVENTH CIRCUIT'S INTERPRETATION OF THE ACT IS IN TENSION WITH THIS COURT'S STEADFAST REFRAIN THAT THE DISCRETION OF DISTRICT COURTS TO TAILOR INJUNCTIVE RELIEF TO THE FACTS OF A CASE SHOULD NOT BE LIGHTLY JETTISONED.

The Eleventh Circuit's interpretation of the Act's remedial provision governing pattern or practice violations as mandating the entry of a permanent injunction in every instance of such violations is in tension with the principle, repeatedly expressed by this Court, that federal statutes

should not be lightly construed to eliminate entirely the discretion of district courts to tailor fact-specific injunctive relief. Respondents' defense of the Eleventh Circuit's interpretation falters on two levels.

First, Respondents fail to rescue the Eleventh Circuit from its threshold error in determining that the pattern or practice provision even applies in this case. Respondents claim that "[t]he Act states if a pattern or practice '*has been carried out* on a substantially nationwide basis' a nationwide injunction shall issue." Opp. 18 (quoting 17 U.S.C. § 119(a)(7)(B)(i)) (emphasis added in Opp.) Respondents skip a step. They gloss over language that triggers application of the nationwide injunction provision in the first place. By its terms, that language limits the coverage of the pattern or practice remedies to cases in which a satellite carrier "*engages* in a willful or repeated pattern or practice of statutory violations." 17 U.S.C. § 119(a)(7)(B) (emphasis added).[5] In short, a nationwide injunction is available only to redress present, ongoing violations, not

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[5] In full, the provision governing nationwide pattern or practice violations of the Act states:

> B) Pattern of Violations – If a satellite carrier engages in a willfull or repeated pattern or practice of delivering a primary transmission made by a network station and embodying a performance or display of a work to subscribers who did not reside in unserved households, then in addition to the remedies set forth in subparagraph A [for individual violations] – (i) if the pattern or practice has been carried out on a substantially nationwide basis, the court shall order a permanent injunction barring the secondary transmission by the satellite carrier, for private home viewing, of the primary transmissions of any primary network station with the same network, and the court may order statutory damages of not to exceed $250,000 for each 6-month period during which the pattern or practice was carried out. . . .

17 U.S.C. § 119(a)(7)(B)(i).

past violations. Applying that reading to the evidence adduced at the bench trial, the district court found that because EchoStar's existing qualification procedures satisfy the Act, EchoStar was not presently engaged in a pattern or practice of violations. Pet. App. 76a.[6]

By its own admission, the Eleventh Circuit conflated the present-tense word "engages" with the past-tense phrase "ever had engaged." Pet. App. 34a. Then, applying that contorted reading, the Eleventh Circuit substituted its own assessment of the evidence for that of the district court, and found that EchoStar had engaged in a pattern or practice of violations – even though the Eleventh Circuit did not upset the district court's ruling that EchoStar's current qualification procedures comply with the Act. Pet. App. 36a. In sum, it was the Eleventh Circuit's initial failure to honor Congress' choice of verb tense that led it to the dubious notion that Congress mandated entry of a nationwide permanent injunction based on conduct (signing up ineligible subscribers) that had ceased. Respondents' attempt to prop up the Eleventh Circuit on that score is unavailing.[7]

Second, Respondents' insistence that the use of the word "shall" in Section 119(a)(7)(B)(i) is an inexorable command to district courts to enter a nationwide injunction, regardless

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[6] By contrast, the injunctive relief provision in the statute at issue in *Hecht v. Bowles*, 321 U.S. 321 (1944), was triggered upon a showing that a person "has engaged or is about to engage" in prohibited acts. *Id.* at 322. At bottom, unlike SHVA, that statute reached both past and present violations.

[7] Respondents intimate that EchoStar would avoid penalties altogether if its verb-tense argument were adopted. Opp. 19. That is not so. The penalties for individual (as opposed to pattern or practice) violations of the Act still would be applicable, as the district court held. Pet. App. 74-75a.

of the facts of a case, pays short shrift to this Court's admonition that such a reading of the word is not always dictated with respect to its use in statutes that call on the judiciary to make decisions in equity. Pet. 16. To be sure, as Respondents point out (Opp. 14-15), in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Hecht*, *supra*, this Court identified other indicia to warrant departure from the normal understanding of the word "shall" as connoting mandatory action. That is true here as well. As the petition notes, the legislative history of SHVA indicates that no violation should be found, and hence no injunction of any stripe should be entered, unless more than 19% of a satellite carrier's subscribers are ineligible. H.R. Rep. No. 100-887(I), at 19 (1988). Under the Eleventh Circuit's ruling, however, the entry of a mandatory nationwide injunction could turn on slight numerical discrepancies: such an injunction must be entered upon a finding of a pattern or practice of violations in which 20% of a carrier's subscribers are ineligible, but such an injunction should not be entered if 19% of a carrier's subscribers are ineligible. Contrary to Respondents' protestations (Opp. 17-18 & n.18), EchoStar invoked the 19% rule not to relitigate the district court's liability finding, but merely to show that, under the Eleventh Circuit's reading of the remedial provision for asserted pattern or practice violations, entry of a mandatory injunction could hinge on razor-thin distinctions. Pet. 17. There is no firm signal that Congress intended to make the evisceration of the traditional discretion of district courts to fashion injunctive relief to hinge on such slim margins.[6]

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[6] As argued in the petition, the affect of the 19% rule also tends to undercut the Eleventh Circuit's reliance on the juxtaposition of the

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Respondents stress that Congress in SHVIA reenacted Section 119(a)(7)(B)(i), without alteration, after the Fourth Circuit's decision in *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999), which like the Eleventh Circuit in this case, interpreted the provision as eliminating the traditional discretion of district courts to craft injunctive relief. Opp. 11 & n.10. Respondents ignore, however, that the legislative history of SHVIA manifests deep concern about the propriety of the Fourth Circuit's interpretation. Pet. 12 n.7 (citing H.R. Rep. No. 106-79, 106th Cong., pt. 1, at 14 (1999)).

Finally, Respondents' contention that EchoStar seeks to render the pattern or practice provision redundant of the individual violation provision is misplaced. Opp. 19. EchoStar seeks only to have the former provision construed in a manner that is consistent with the fundamental tenet that the traditional discretion of district courts to tailor injunctive relief commensurate with the facts of particular cases is not to be loosely jettisoned.

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discretionary-sounding word "may" with the mandatory-sounding word "shall" in Section 119(a)(7)(B)(i). Pet. 16-17.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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